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Supreme Court, U.S.
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No. 95-953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LIBERTY CABLE COMPANY, INC.,

Petitioner,

– vs. –

CITY OF NEW YORK, RALPH A. BALZANO, Commissioner of Department of Information Technology and Telecommunications, NEW YORK STATE COMMISSION ON CABLE TELEVISION, WILLIAM B. FINNERAN, GERARD D. DIMARCO, BARBARA T. ROCHMAN, DAVID F. WILBUR, and JOHN PASSIDOMO, UNITED STATES OF AMERICA, TIME WARNER CABLE OF NEW YORK CITY, and PARAGON CABLE MANHATTAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The argument offered by all respondents in opposition to the Petition for a Writ of Certiorari -- that the Petition has been rendered moot by both the Telecommunications Act of 1996 and the Public Service Commission's ("PSC") prospective withdrawal of the challenged Standstill Order -- is misleading for two reasons.

First, both the statutory amendment and the withdrawal of the Standstill Order by the PSC have prospective effect only. The PSC, successor to the New York State Commission on Cable Television, issued an Order on February 15, 1996 (the "February 1996 Order") -- one day before the respondents' briefs in opposition to the petition for certiorari were due -- which vacated the Standstill Order. While Liberty is no longer enjoined from exercising its First Amendment rights to serve non-common systems by use of hardwire connections, the validity of the Standstill Order still presents a live controversy.

As the PSC concedes at 2 of its Opposition, the PSC has pending before it the question of the "lawfulness" of Liberty's operations before February 8, 1996. The February 1996 Order explicitly reserves the question of the statutory penalties to impose on Liberty for any violations of the Standstill Order. *See*, February 1996 Order attached as an exhibit to the Opposition of the Public Service Commission of the State of New York, at 2. These statutory penalties are staggering.[1] Because the issue of the remedy to impose on Liberty for its exercise of First Amendment rights is still very much alive, the question presented in the Petition retains its vitality with respect to the pending PSC enforcement proceeding. The Petition should be granted because the lower court opinions improperly held to be un-ripe an action seeking to enjoin the continuing enforcement by a state agency of a prior restraint on First Amendment speech.

Second, Petitioner, as respondents acknowledge, seeks declaratory relief in this action. Again, because the statutory amendment and the PSC's lifting of the Standstill Order have impact only prospectively, and because the PSC seeks to impose penalties for pre-amendment violations of the Standstill Order, the declaration sought has not been rendered moot. A declaration that enforcement of the Standstill Order would violate Petitioner's First Amendment rights satisfies the case

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[1] The PSC may impose a penalty of up to $1,000 a day on a cable operator for each and every violation of its order. N.Y. Exec. Law 827-a(1).

or controversy requirement of the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, as much today as it did before the Standstill Order was withdrawn. *See Powell v. McCormack*, 395 U.S. 486, 495, 89 S.Ct. 1944, 1950 (1969).

Finally, if the Court accepts the arguments of respondents and determines that the case has been rendered moot, then the appropriate response, pursuant to *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104 (1950), would be summarily to grant certiorari, to vacate the judgments below and to remand with a direction to dismiss. *See, Alabama v. Davis*, 446 U.S. 903, 904, 100 S.Ct. 1827, 1828 (1980) (Stevens, J. *dissenting*); 13A Wright, Alan W., Miller, Arthur R., Cooper, Edward H., *Federal Practice and Procedure*, § 3533.10 (2d Ed. 1984) at 434.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Court issue a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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